IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BLACKBIRD TECH LLC d/b/a
BLACKBIRD TECHNOLOGIES,

Plaintiff,

v.

3NLED LIGHTING USA INC.,

Defendant.

C.A. No. 15-063 (RGA)

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR ENTRY OF DEFAULT JUDGMENT AND A PROTECTIVE ORDER

OF COUNSEL:

Wendy Verlander
wverlander@blackbird-tech.com
Christopher Freeman
cfreeman@blackbird-tech.com
Sean K. Thompson
sthompson@blackbird-tech.com
Blackbird Technologies
One Boston Place, Suite 2600
Boston, MA 02108
617.307.7100

STAMOULIS & WEINBLATT LLC

Stamatios Stamoulis #4606
stamoulis@swdelaw.com
Richard C. Weinblatt #5080
weinblatt@swdelaw.com
Two Fox Point Centre
6 Denny Road, Suite 307
Wilmington, DE 19809
Telephone: (302) 999-1540

Attorneys for Plaintiff
Blackbird Tech LLC d/b/a
Blackbird Technologies

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 1

ARGUMENT 2

I. DEFAULT JUDGMENT SHOULD BE ENTERED AGAINST DEFENDANT 2

II. A DECISION ON DAMAGES SHOULD BE DEFERRED AND AN APPROPRIATE PROTECTIVE ORDER ENTERED TO FACILITATE DAMAGES DISCOVERY 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Blackbird Tech LCC v. Serv. Lighting and Elec. Supplies, Inc., CV 15-53-RGA, 2016 WL 2904592 (D. Del. May 18, 2016) 5

Broadcast Music, Inc. v. Spring Mt. Area Bavarian Resort, Ltd., 555 F. Supp. 2d 537 (E.D. Pa. 2008) 3

Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000) 3, 4

Comdyne I, Inc. v. Corbin, 908 F.2d 1142 (3d Cir. 1990) 4

Innovative Off. Products, Inc. v. Amazon.com, Inc., 2012 WL 1466512 (E.D. Pa. Apr. 26, 2012) 4

Tristrata Tech., Inc. v. Med. Skin Therapy Research, Inc., 270 F.R.D. 161 (D. Del. 2010) 3, 4

U.S. v. $55,518.05 in U.S. Currency, 728 F.2d 192 (3d Cir. 1984) 3

Pursuant to Federal Rules of Civil Procedure 26 and 55, Plaintiff Blackbird Tech LLC d/b/a Blackbird Technologies ("Plaintiff") respectfully submits its Brief in support of its Motion for Entry of Default Judgment against Defendant 3NLED Lighting USA, Inc. ("Defendant") and a Protective Order. Plaintiff's Proposed Default Judgment is attached hereto as Exhibit A and Proposed Protective Order is attached hereto as Exhibit B.

PRELIMINARY STATEMENT

Entry of a default judgment is warranted because, in the absence of a default judgment, Plaintiff would be prejudiced by Defendant's continued infringement, Defendant has no litigable defenses, and Defendant's delay is due to culpable conduct, *i.e.*, choosing to cease participation in this litigation despite knowledge of—and previous active participation in—it. Plaintiff respectfully requests, however, that the Court defer a decision on damages, and, accordingly, entry of final judgment, to allow Plaintiff additional time to conduct damages-related discovery. Plaintiff has subpoenaed third parties that distribute Defendant's infringing products and intends to subpoena additional third parties in an effort to uncover sufficient evidence to obtain damages with respect to at least some sales of the infringing products. In connection with that discovery, Plaintiff also requests that the Court enter a protective order that will facilitate the production of documents by third parties.

STATEMENT OF FACTS

On January 20, 2016, Plaintiff filed suit against Defendant, alleging that certain LED lighting products infringed U.S. Patent No. 7,086,747 (the "Asserted Patent"). (D.I. 1.)

On April 10, 2015, Plaintiff served the Complaint on Defendant. (D.I. 6.) The Complaint alleges that Plaintiff owns the Asserted Patent (D.I. 1 ¶ 1), that the Asserted Patent is valid and enforceable (*id.* ¶ 9), and that "3NLED has in the past and continues to infringe literally, and/or under the Doctrine of Equivalents, one or more of the claims of the '747 Patent by making, using, importing, selling and/or offering to sell, in this judicial district and elsewhere in the United States, Retrofit LED Tube Lights including, but not limited to, one or more of the LED Tube Lights listed in Exhibit B . . . ." (D.I. 1 ¶ 10.) Exhibit B to the Complaint contained a list of LED Tube Lights sold by Defendant (the "Accused Products"). (D.I. 1, Ex B.)

After requesting and receiving multiple extensions of its time to respond to the Complaint, Defendant, joined by two other Defendants represented by the same counsel, moved to dismiss the Complaint on the grounds of non-infringement. (D.I. 8.) The Court denied this motion on December 3, 2015.

On December 17, 2016, Defendant's time to file a responsive pleading to Plaintiff's Complaint under Federal Rule of Civil Procedure 12(a)(4)(A) expired. Defendant has never filed an answer to the Complaint.

On April 18, 2016, counsel for Defendant moved to withdraw as counsel on the grounds that Defendant had ceased communicating with it. (D.I. 39.) Plaintiff did not oppose the motion. Following a hearing on May 16, 2016, the Court ordered Defendant to associate with new Delaware counsel within 30 days or face entry of default. (D.I. 47.)

On June 20, 2016, new counsel for Defendant not having appeared, the Court entered default against Defendant under Federal Rule of Civil Procedure 55(a). (D.I. 50.)

On August 1, 2016, Plaintiff sent a letter to all known U.S. physical and email addresses of Defendant, informing it that Plaintiff intended to immediately move for entry of default judgment. Defendant did not respond.

ARGUMENT

I. DEFAULT JUDGMENT SHOULD BE ENTERED AGAINST DEFENDANT

Under Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default judgment against a party when default has been entered by the Clerk of the Court under Federal Rule of

Civil Procedure 55(a). "[W]hether to enter default judgment is a matter within the discretion of the trial court." *Tristrata Tech., Inc. v. Med. Skin Therapy Research, Inc.*, 270 F.R.D. 161, 164 (D. Del. 2010). "Three factors control whether a default judgment should be granted: (1) prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct." *Chamberlain v. Giampapa,* 210 F.3d 154, 164 (3d Cir. 2000). Here, all factors weigh in favor of entering default.

First, Plaintiff will be prejudiced if default judgment is not entered. Defendant's decision to cease participating in this litigation has left Plaintiff without a mechanism to enforce its patent rights. In such circumstances, Courts in this District have found that denying entry of a default judgment would prejudice a patent holder. *See, e.g.*, *Tristrata*, 270 F.R.D. at 164 (finding that plaintiff would be prejudiced in the absence of a default judgment where it could not enforce its patent rights or recover damages against defendant that had submitted no substantive response to the complaint).

Second, Defendant does not have a litigable defense. For there to be a litigable defense, the defendant not only must respond to the complaint but also must allege sufficient facts which, "if established at trial, would constitute a complete defense to the action." *U.S. v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984). Defendant's motion to dismiss was denied and Defendant failed to otherwise respond to the Complaint. Thus, there is nothing in the record that suggests the existence of a viable, much less meritorious, defense. *See Broadcast Music, Inc. v. Spring Mt. Area Bavarian Resort, Ltd.,* 555 F. Supp. 2d 537, 542 (E.D. Pa. 2008) (entering default judgment where there was "nothing in the record to suggest that Defendants have a litigable defense as to liability").

Third, Defendant's delay here is due to culpable conduct. "Culpable conduct" refers to actions that are "taken willfully or in bad faith." *Chamberlain,* 210 F.3d at 164 (citing *Gross v. Stereo Component Sys., Inc.,* 700 F.2d 120, 124 (3d Cir. 1983)). Defendant was aware of—and actively participating in—this litigation, but chose to cease that participation, despite continuing to sell the Accused Products. Courts routinely hold failure to participate in litigation, despite knowledge of it, to be "willful and culpable" conduct. *See, e.g.*, *Innovative Off. Products, Inc. v. Amazon.com, Inc.*, 2012 WL 1466512, at *3 (E.D. Pa. Apr. 26, 2012) (holding defendant's failure to participate in litigation "willful and culpable," where it had received a ceased and desist letter and a copy of plaintiff's patent infringement complaint).

Consequently, Plaintiff respectfully requests that the Court enter default judgment against Defendant, but, as discussed below, defer decision on damages.

II. A DECISION ON DAMAGES SHOULD BE DEFERRED AND AN APPROPRIATE PROTECTIVE ORDER ENTERED TO FACILITATE DAMAGES DISCOVERY

Because factual allegations relating to damages in a complaint are not taken as true in the event of default, *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1149 (3d Cir. 1990), and Defendant ceased participating in litigation before providing its sales and revenue figures and failed to respond to Plaintiff's discovery requests, Plaintiff does not believe it has sufficient evidence to prove damages at this time. Consequently, Plaintiff requests that the Court defer any decision on damages, as well as entry of final judgment, to a later date to allow Plaintiff additional time to collective evidence regarding Defendant's sales of the Accused Products and an appropriate royalty rate for the Asserted Patent. *See, e.g.*, *Tristrata*, 270 F.R.D. at 165 (entering default judgment, but deferring decision on the amount of damages).

In addition, Plaintiff has served subpoenas on third parties that are distributing the Accused Products and anticipates serving other subpoenas on third parties to discover damages-related information. Certain third parties have objected to the production of documents in the absence of a protective order. Accordingly, Plaintiff respectfully requests that the Court enter the protective order attached hereto as Exhibit B. This Proposed Protective Order allows third parties to designate information as "HIGHLY CONFIDENTIAL" and limits Plaintiff's ability to disclose information to the same degree as the Protective Order entered in the co-pending related cases.[1] Plaintiff respectfully notes that, because Defendant ceased participation in this case before producing any confidential information, the Proposed Protective Order does not include a prosecution bar or covenant not to sue, such as has been entered in the Related Cases pursuant to the Court's decision in *Blackbird Tech LCC v. Serv. Lighting and Elec. Supplies, Inc.*, CV 15-53-RGA, 2016 WL 2904592 (D. Del. May 18, 2016).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter a Default Judgment in the form attached hereto as Exhibit A and a Protective Order in the form attached hereto as Exhibit B.

[1] 15-cv-053, 15-cv-056, 15-cv-057, 15-cv-058, 15-cv-060, 15-cv-061, 15-cv-062, 15-cv-064 (the "Related Cases").

Dated: August 5, 2016

STAMOULIS & WEINBLATT LLC

OF COUNSEL:

/s/ *Stamatios Stamoulis*

Stamatios Stamoulis #4606
stamoulis@swdelaw.com
Richard C. Weinblatt #5080
weinblatt@swdelaw.com
Two Fox Point Centre
6 Denny Road, Suite 307
Wilmington, DE 19809
Telephone: (302) 999-1540

Attorneys for Plaintiff
Blackbird Tech LLC d/b/a
Blackbird Technologies

Wendy Verlander
wverlander@blackbird-tech.com
Christopher Freeman
cfreeman@blackbird-tech.com
Sean K. Thompson
sthompson@blackbird-tech.com
Blackbird Tech LLC d/b/a
Blackbird Technologies
One Boston Place, Suite 2600
Boston, MA 02108
617.307.7100

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I served the foregoing document on 3NLED Lighting USA Inc., which is proceeding *pro se*, by U.S. mail sent to the following addresses:

3NLED LED Lighting USA Inc.
4019 Clipper Ct.
Fremont, CA 94538

3NLED LED Lighting USA Inc.
150 Selig Dr.
SW Atlanta, GA 30336

/s/ Stamatios Stamoulis
Stamatios Stamoulis #4606